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September 18, 2006

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, DC 20554

Subject: In the Matter of Payphone Access Line Rates, Docket CC No. 96-128

Dear Ms. Dortch:

We represent 51 payphone service providers ("Payphone Providers") in 11 states who are suing Qwest in federal court (in the "*Davel*" case) for overcharging them for payphone services, in violation of the Telecommunications Act, this Commission's implementing orders and the Commission's New Services Test.[1]

The Payphone Providers submit this letter in support of their Petition For Declaratory Ruling filed in this docket on September 11, 2006 ("Petition"), and to respond to Qwest's arguments presented in its September 6, 2006 *ex parte* filing in CC Docket No. 96-128 ("*Qwest Ex Parte*"). In the *Qwest Ex Parte* Qwest argues—without foundation—that it has no duty to refund to the Payphone Providers the amounts that Qwest overcharged them for payphone access line ("PAL") services in violation of the Commission's New Services Test. The Payphone Providers will not highlight all deficiencies of the *Qwest Ex Parte* but instead focus on the following:

(1) Res judicata and collateral estoppel do not excuse Qwest's duty to pay refunds, despite Qwest's claims, because Qwest did not even file with state commissions, let alone obtain any orders approving its PAL rates before 2002,

[1] The case, which is proceeding before the Ninth Circuit, is captioned *Davel Communications, et al. v. Qwest*. A list of all 51 Payphone Providers is attached to their September 11, 2006, Petition in this docket.

(2) The Commission's 1997 *Waiver Order* ("*Waiver Order*"), which granting Qwest a temporary waiver of the New Services Test, limited the length of the waiver Qwest received to 45 days, not the length of the refund period,

(3) The FCC should not subvert the Ninth Circuit's finding that the filed rate doctrine does not apply to the Petition nor claims under 47 U.S.C. § 276(a),

(4) The FCC should reject Qwest's effort to try the *Davel* case before the FCC,

(5) Qwest relied on the *Waiver Order* by collecting dial around compensation beginning April 15, 1997, which would have otherwise been illegal,

(6) Had Qwest not violated the FCC's orders *ab initio*, the *Waiver Order's* refund obligation would not have been open-ended, and

(7) The *Waiver Order* applied to tariffs filed before April 15, 1997.

I. Res Judicata And Collateral Estoppel Are Irrelevant

In its ex parte filing, Qwest argues that "the state proceedings . . . are totally dispositive of Davel's claims," which is essentially a claim that res judicata and collateral estoppel excuse Qwest from paying refunds. *See Qwest Ex Parte* at 3. Res judicata and collateral estoppel are irrelevant to Qwest. Qwest failed to file cost data or seek approval of its basic PAL rates under the New Services Test until 2002-2003, so there are no orders establishing res judicata or collateral estoppel prior to this time. This is proven by the fact that Qwest cites no such orders.[2]

Qwest's failure to make the NST filings the FCC required is a fatal flaw in Qwest's defenses to refunds and an important distinction between Qwest's behavior and that of the other RBOCs. Indeed, Qwest finally appears to realize the importance of this distinction between its position and that of the other RBOCs. In its September 5, 2006, ex parte filing, Qwest devotes several pages in a vain attempt to mislead the Commission into believing that Qwest ***did*** make the required filings between April 4 and May 19, 1997. *See Qwest Ex Parte* at 14-15. As to the relevant states, however, the fact remains, as alleged in the *Davel* complaint,[3]

[2] It is ironic that the *Qwest Ex Parte* at one point contends that only state commissions can determine whether Qwest's PAL rates complied with the New Services Test, but elsewhere contends that Qwest's own self-serving determination—not that of any state commission—that its pre-existing PAL rates complied should have the same res judicata effect as **if** the there were a state decision.

[3] This fact issue can be viewed either as Qwest's transparent attempt at slight of hand or, at the least, a disputed issue of fact. If the later, the Commission does not need to decide this question of fact. The

that Qwest made no filings in an attempt to comply with the NST until many years later. Thus, to the extent Qwest complains that the *Waiver Order* created an "open-ended" refund requirement, it is a self-inflicted wound. Qwest could have (and should have) filed its cost studies with the states, as the Commission directed and the other RBOCs did, by May 19, 1997. Failing any state filing, lacking any state review, and in the absence of any final state orders, the defenses of res judicata and collateral estoppel are not in any way implicated as to the relevant Qwest states.[4]

Contrary to the impression the *Qwest ex parte* tries to convey, a close review of its Exhibit 2 establishes Qwest's near complete disregard of its filing obligations under the *Payphone Orders* in Docket CC No. 96-128 ("*Payphone Orders*") and the *Waiver Orders.* The three states where Qwest made timely PAL filings in an effort to comply with the NST or where the NST was litigated and a final orders entered were Arizona, Montana, and Oregon.[5] Those three state are ***excluded*** from the *Davel* case, precisely to avoid any res judicata or estoppel issues. A summary is provided in the table attached as Exhibit 1 to this letter.

Qwest seems to be attempting to bootstrap the other RBOCs' defenses of res judicata and collateral estoppel to apply equally to ***inaction*** by state commissions in Qwest's territory. Plainly, the lack of action by a state commission or court does not create any bar to refunds. Nor does Qwest's failure to file the required tariffs or cost support with the state commissions give Qwest a defense to its refund obligation.

II. The *Waiver Order* Limited The Length Of The Waiver Qwest Received To 45 Days, Not The Length Of The Refund Period

Qwest argues that the waiver in the *Waiver Order* is "limited" (*See Qwest Ex Parte* at 9 and n. 24), but in fact the "limited" nature of the waiver was that it severely limited the extent to which the Qwest could be in violation of the *Payphone Orders* and the preconditions Qwest had to meet in order to be allowed to violate the *Payphone Orders*. Likewise, the "brief duration" of the waiver was a restriction on how long Qwest could be in violation of the *Payphone Orders*. Neither provision was a limitation on Qwest's obligation to pay refunds to the PSPs when Qwest final complied with the *Payphone Orders* beginning in 2002.

III. The FCC Should Not Subvert The Ninth Circuit's Finding That The Filed Rate Doctrine Is Not Relevant

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Ninth Circuit has not referred fact questions to the Commission and the courts are perfectly cabable of deciding the fact questions after discovery and trial.

[4] Of Qwest's 14 states, Davel's complaint excludes requests for PAL refunds for Arizona, Montana, and Oregon.

[5] In Oregon a final PUC order was entered in 2001, but overturned in 2004 by an appellate court because Qwest failed to comply with the New Services test. The case is still open on remand.

Qwest asks the FCC to substitute its judgment for that of the Ninth Circuit on Qwest's "filed rate doctrine" defense. *See Qwest Ex Parte* at 8. The Commission should reject this request for sound legal and practical reasons, regardless of whether or not the Commission has the theoretical power to depart from the *Davel* holdings.[6] The *Davel* decision is on all fours with the issue as teed up in the pending petitions. It is the only federal appellate decision on point. It is well-reasoned. The filed tariff doctrine is a judicially created doctrine that the courts are well-equipped to interpret and apply if appropriate.

The FCC should not issue an order conflicting with the Ninth Circuit's guidance.[7] It is the best and only indication of how an appellate court views the law on the filed tariff defense.

IV. The FCC Should Reject Qwest's Effort To Try The Davel Case Before The FCC

Predictably, Qwest has already begun in what may become an all-out effort to shift the trial of as much of the *Davel* case as possible to the Commission. While the Commission's broad authority might permit it to opine on any number of issues relating to the *Waiver Orders*, the Payphone Providers urge the Commission to keep its decision narrow and focused on the issues and petitions that are actually before it. Qwest's motivation is self-evident. It has lost most of its defenses in the courts and now wants a second bite at the apple. And if it can't get a second bite at the apple, Qwest at least wants to try to get the FCC to decide as many of the remaining issues—including questions of fact—as possible.

Qwest's knows that Petitioners will be procedurally handicapped if their case is tried before the Commission. For starters, discovery at the FCC in declaratory proceedings is non-existent. Qwest knows that its factual assertions before the Commission need not meet standards of the Federal Rules of Evidence. Nor will they be subject to cross examination. Thus, for example, Qwest tries to give the Commission the false impression that the 11 state commissions actually received cost data and reviewed Qwest's PAL rates during the 45 day waiver period in 1997. Such *legerdemain* will be readily exposed after discovery and trial.

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[6] Petitioners do not concede that deference on the filed tariff doctrine would be appropriate here. Moreover, as the Commission might anticipate appeals from its decision, it might also expect that under the Hobbs Act an appeal regarding the Petitions could as likely be heard by the Ninth Circuit—perhaps the very same panel as in *Davel*—as any other circuit.

[7] Qwest's claim that it "never challenged" the Ninth Circuit's holding on the filed rate doctrine is remarkable, considering that Qwest filed a strident petition for rehearing with the Court. Qwest's efforts to neutralize the utter rejection of its principle defense to the claims in *Davel* is a transparent attempt to evade the decision.

The Commission's resources to address a fact-intensive contested matter are relatively limited. Finally, Qwest may hope that it can ride the coattails of the other RBOC defenses, such as res judicata, that are not factually applicable to Qwest.

V. Qwest Relied On The *Waiver Order* By Collecting Dial Around Compensation, Which Would Have Otherwise Been Illegal

Qwest claims that it did not rely on the *Waiver Order*. *See Qwest Ex Parte* at 8. The fact issue of whether Qwest "relied" on the *Waiver Order* is also not a matter that the Ninth Circuit referred to the Commission. The legal question of what constituted "reliance" on the *Waiver Order* is before the Commission, however. The only rational interpretation of the *Waiver Order* is that an RBOC "relied" on it by collecting dial-around compensation ("DAC") beginning on April 15, 1997, without first having NST-compliant rates in effect. To have begun collecting DAC before complying with the NST would have been unlawful. Therefore, an RBOC that did so must have been relying on the *Waiver Order*.

Qwest completely misconstrues what constitutes reliance. Under Qwest's theory because Qwest violated its filing obligations under the *Waiver Orders* and the *Payphone Orders*, Qwest cannot have relied on the second *Waiver Order*. Reduced to its simplest terms, Qwest's argument is that **its own violation** of the filing requirements of the *Waiver Order* **gives Qwest a defense** to the refund provisions of the *Waiver Order*. The idea that malfeasance or nonfeasance can create a defense is ludicrous.

If Qwest did not rely on the *Waiver Order*, then Qwest should not have collected the DAC and must now disgorge it. While that would accord some measure of justice to Qwest, which unlike the other RBOCs failed to even attempt to secure state approval of its existing PAL rates in 1997, it would result in a windfall to the interexchange carriers. Most importantly, it would leave the damaged parties—the PSPs—without a refund of the substantial overcharges they suffered for many years.

VI. Had Qwest Not Violated The FCC's Orders, The Refund Obligation Would Not Have Been Open-Ended

Qwest is faced with a self-inflicted wound. All Qwest had to do was comply with the Commission's explicit and repeated directives to file cost support for its PAL rates with the states by May 19, 1997 and ask the states to review its then-existing PAL rates for NST compliance. Qwest did so in Arizona, Montana, and Oregon[8] and it is not being sued for PAL

[8] Or those states otherwise had Qwest's PAL rates under review, e.g. in the Oregon general rate case.

refunds for those states.[9] The only reason the *Waiver Order* became open-ended for Qwest is that Qwest started collecting DAC on April 15, 1997—taking advantage of one aspect of the *Waiver Order*—but then failed to comply with the filing requirements by May 19 1997—ignoring the critically important condition precedent to collecting DAC. Qwest's failure to file persisted for another five years.

VII. The *Waiver Order* Applied To Tariffs Filed Before April 15, 1997

Qwest argues the *Waiver Order* did not apply to tariffs filed before April 15, 1997. The exact opposite is true, based on the plain language of the order. It stated: "The existing intrastate tariffs for payphone services will continue in effect until the intrastate tariffs filed pursuant to the Order on Reconsideration, the Bureau Waiver Order and this Order become effective." *Waiver Order*, ¶ 18 (emphasis added). Further, the order stated: "The RBOC Coalition and Ameritech have committed . . . to reimburse . . . customers . . . if newly tariffed rates, when effective, are lower than the existing rates." Id., ¶ 20 (emphasis added). These passages make two things clear. First, the existing PAL rates were subject to refund if Qwest began to collect DAC before the states approved them as being in compliance with the NST. Second, the refund obligation was open-ended to such time as the tariff filings required by the "Order on Reconsideration, the Bureau *Waiver Order*, and this Order become effective." If such time became surprisingly long in Qwest's case, it is because Qwest delayed five years in making the required filings.

Qwest's real argument here is somewhat obfuscated. Recognizing that it is in a very weak position relative to the other RBOCs because of its failure to file with the states in 1997 as required, Qwest hints that it did not need to file anything because it secretly believed (based on a gross misapplication of the NST that the FCC completely discredited in the *Wisconsin Order*) that its existing rates complied with the NST. The unspoken foundation of this argument is that the FCC delegated review of the lawfulness of Qwest's rates not to the states, but to Qwest itself. This is a strange argument even under normal ratemaking circumstances.[10] But given that the NST was being implemented pursuant to Congress' directive to end to RBOC's discrimination against their competitors in the payphone industry, it is an absurd argument. If Congress had chosen to entrust Qwest to end its discrimination, it would not have directed the Commission to establish regulations to force Qwest to end that discrimination.

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[9] Qwest is not being sued in Oregon in the *Davel* case, but Oregon refunds are still before the Oregon PUC, which is awaiting FCC guidance.

[10] And indeed, where it is now convenient for Qwest to make the argument, Qwest contends that only "State regulators . . . have the jurisdiction to determine the reasonableness of [Qwest's] PAL rates. *See Qwest ex parte* at 17.

Given that Qwest demonstrably charged PSPs PAL rates more than 3 times the lawful rate for more than 5 years after discrimination was to have ended, Congress' lack of trust in the RBOCs to do the right thing voluntarily was well-founded.

Apart from Congressional intent, it is also quite clear that this Commission never intended to delegate review for compliance with the NST and Section 276(a) to Qwest.[11] The Commission repeatedly and expressly delegated review to the states, requiring Qwest to file the necessary cost support for the states to do so. For example, in the *Reconsideration Order*[12] at ¶ 163, "[w]e require LECs to file tariffs . . . in the intrastate jurisdiction[] . . . States must apply these requirements . . . We will rely on the states . . . states may, after considering the requirements of this order, [approve the existing tariffs]." (emphasis added). And in the *Waiver Order*, ¶¶ 18, 23, the Commission said: "the requisite cost-support data must be submitted to the individual states . . . Because the LECs are required to file, and the states are required to review, intrastate tariffs . . . , the states' review of the intrastate tariffs [will ensure compliance with the NST]" (emphasis added).

Finally, Qwest incorporates by reference and earlier argument that refunds would violate Section 204 of the Communications Act.[13] First, this appears to be a back door attempt to recoup the filed rate doctrine defense that the Ninth Circuit has eviscerated. Second, the provisions of Section 204 only apply to tariffs filed at the Federal level ("Whenever there is filed with the Commission any new or revised charge . . . ."). Third, even assuming, for sake of argument, that Section 204 applied to a state filing, Qwest is trying to apply it to a **non**-filing. Again, Qwest complains about a self-inflicted wound. It was Qwest that had both the obligation to file rates, or at least cost studies with the states, by May 19, 1997. It was Qwest that failed to do so until 2002. Finally, the FCC should not be dissuaded by the alleged difficulty of

[11] Qwest argues that the Reconsideration Order did not require refiling of existing tariffs if the RBOC believed they complied with the NST. The orders are not clear on this precise question. However, just because the RBOC might not have needed to file a new tariff, that did not excuse the filing of cost support with the states. The orders unambigously delegated review of Qwest's PAL tariffs for compliance with the cost-based requirements of the NST. The states could not do that without Qwest first submitting cost support for the existing rates. Qwest never did that, of course. Moreover, there is not ambiguity in the requirement that the RBOCs submit cost support to the states.

[12] *Order on Reconsideration*, 11 FCC Rcd. 21,233 at ¶ 163 ("*Order on Reconsideration*");

[13] *Qwest ex parte* at 17, note 51.

calculating the refunds that Qwest owes to the PSPs. The issue of damages has not been referred to the Commission. This is a procedural boogeyman that should not distract the Commission from the narrow issue that has been referred.

Sincerely,

Brooks E. Harlow

cc w. enc: Ms. Pamela Arluk (via e-mail)
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Mr. Donald Stockdale (via e-mail)
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Exhibit 1

Arizona	N/A (not part of the Payphone Providers' claim).
Colorado	Qwest admits it made no filings pursuant to the NST by May 19, 1997. On complaint, the Colorado PUC kept case open for further FCC guidance. After FCC rejected Qwest's interpretation of the NST and filed NST-based rates, PSPs filed suit within 2 years of Qwest's filing of compliant tariffs
Idaho	Qwest admits it made no filings pursuant to the NST until 2002.
Iowa	Qwest admits it made no filings pursuant to the NST until 2002
Minnesota	Qwest admits it made no filings pursuant to the NST until 2002.
Montana	N/A (not part of the Payphone Providers' claim).
Nebraska	Qwest admits it made no filings pursuant to the NST until 2002.
New Mexico	Qwest admits it made no filings pursuant to the NST until 2002.[14]
North Dakota	Qwest admits it made no filings pursuant to the NST until 2002.
Oregon	N/A (not part of the Payphone Providers' claim). However, both Qwest's PAL rates, which have been under review in Oregon since 1996, and PAL refunds are still awaiting final orders. The Oregon PUC awaits Commission guidance on refunds.
South Dakota	Qwest admits it made no filings pursuant to the NST until 2002.[15]

[14] The case Qwest cites had to do with whether payphone subsidies had been removed from access charge rates

[15] Only Qwest's "Smart PAL" rates were at issue there. Smart PAL rates are not part of the *Davel* case.

Utah	Qwest admits it made no filings pursuant to the NST until 2002.
Washington	Qwest admits it made no filings pursuant to the NST until 2003.[16]
Wyoming	Qwest admits it made no filings pursuant to the NST until 2002.

[16] The case Qwest cited was a general rate case and there was no consideration by Qwest or the WUTC of the NST, which had not been adopted by the time the WUTC issued its substantive ruling (in the WUTC's Fifteenth Order, not the 24th Order Qwest cites).

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